



October 18, 2019

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket No. 10-90; FCC-CIRC1910-01

Dear Ms. Dortch:

ITTA - The Voice Of America's Broadband Providers (ITTA), USTelecom – the Broadband Association (USTelecom), and the Wireless Internet Service Providers Association (WISPA) (collectively, “the Associations”) write to supplement several letters filed earlier this week memorializing meetings we had with Commissioners’ Legal Advisors and Commission staff regarding the above-captioned Draft Order on Reconsideration scheduled to be voted upon at the Commission’s October 25, 2019 Open Meeting.¹ Specifically, we supplement our advocacy related to the Draft Order’s proposed remedies for broadband performance testing misses.

In the Association Letters,² we observed that the Draft Order would “clarify” for the first time that “any failure to meet the speed and latency requirements will be considered a failure to deploy.”³ We described the potentially massive claw back of funding that could ensue as a result of speed or latency performance shortcomings with a very small number of locations, and how even the specter of such funding penalties could harm USF recipients who comply with performance requirements, insofar as banks will be highly reluctant to issue letters of credit or lend money given the possibility of these draconian penalties 10 years down the line even after providers successfully fulfill performance requirements during the several years prior. While we support the Commission’s objectives of USF program compliance and accountability, we requested that the Commission revise the “Remedies for Non-Compliance” section of the Draft Order⁴ to ensure that the penalties for performance compliance shortfalls do not end up being completely inequitable for the magnitude of the performance failure; consider whether there are different, more proportionate means of enforcing its speed and latency requirements; and modify the Draft Order in a manner that leads to a more rational result for end-of-term testing.

¹ See Letters from Mike Saperstein, Vice President, Policy & Advocacy, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 10-90 (filed Oct. 15, 2019) (Association Letters); *Connect America Fund*, Order on Reconsideration, FCC-CIRC1910-01 (Public Draft Oct. 4, 2019) (Draft Order).

² See Association Letters at 2-3.

³ Draft Order at para. 69.

⁴ See *id.* at Sec. III.I.

A start to addressing the infirmities of this section of the Draft Order would be for the Commission to clarify language which may be read to suggest that at the conclusion of a provider's buildout term, the Commission will evaluate both the aggregate performance of the test locations in a state as well as the performance of each individual location within the test sample. The underlying *Broadband Performance Measurements Order*, petitions for reconsideration and applications for review of which the Commission is addressing in the Draft Order, provides that the Commission will measure compliance with speed and latency standards "in each state," "determin[ing] a carrier's compliance for each standard separately," by "divid[ing] the percentage of [a provider's] measurements meeting the relevant standard by the required percentage of measurements to be in full compliance."⁵ Nowhere does the *Broadband Performance Measurements Order* indicate that compliance will be measured on an individual location basis, whether or not in conjunction with aggregate statewide performance of test locations. Nor does the Draft Order assert that the Commission is modifying its compliance framework to measure compliance on an individual location basis.

However, certain language in the Draft Order appears to suggest that in evaluating a provider's compliance with speed and latency performance requirements, the Commission will analyze the provider's aggregate statewide performance *in addition to* the performance of each individual location within the test sample. Paragraph 69 of the Draft Order states that "if a carrier has deployed to 100% of its required locations, *but only 90% of those locations meet the required speed and latency measurements*," USAC will recover support "for the relevant number of locations that do not meet the speed and latency requirements."⁶ As discussed above, nowhere does the *Broadband Performance Measurements Order* contemplate a dual authentication process for evaluating compliance, nor does the Draft Order enunciate, let alone endeavor to justify, a change in how compliance will be analyzed.

Therefore, the Commission should clarify that the approach delineated in the *Broadband Performance Measurements Order* still applies; namely, that the broadband performance measurements compliance framework is based on latency and speed compliance percentages measured separately and statewide, not by individual location. In addition to such clarification, the Commission should amend paragraph 69 of the Draft Order as follows:

⁵ *Connect America Fund*, Order, 33 FCC Rcd 6509, 6532, para. 60 (WCB/WTB/OET 2018) (*Broadband Performance Measurements Order*). The *Broadband Performance Measurements Order* provides as examples of how the Commission will calculate latency and speed compliance percentages that "if a low-latency provider observes that 90 percent of all its testing hours measurements are at or below 100 ms, then that provider's latency compliance percentage would be $90/95 = 94.7$ percent *in that state*," and that "if a provider observes that 65 percent of its testing hours speed measurements meet 80 percent of the required speed, the provider's compliance percentage would be $65/80 = 81.25$ percent for the relevant speed tier *in that state*." *Id.* at para. 61 (emphases added).

⁶ Draft Order at para. 69 (emphases added). *See also id.* at n.182 (illustrating the resulting recovery by USAC from a provider where the provider "deployed to 100 locations, *but only 90 of those locations met the requisite speed and latency requirements, leaving a shortfall of 10 locations*") (emphasis added).

Thus, for example, if a carrier has deployed to 100% of its required locations, but only meets the latency threshold in 90% of its testing measurements~~of those locations meet the required speed and latency measurements~~, USAC will calculate the percentage of compliance~~recover the percentage of the carrier's support equal to 1.89 times the average amount of support per location received in the state for that carrier over the term of support~~ for the relevant number of test locations commensurate with paragraph 61 of the *Performance Measures Order*~~that do not meet the speed and latency requirements, plus 10 percent of the carrier's total relevant high-cost support over the support term for that state.~~⁷

To be clear, this clarification would be a start to addressing the myriad inequities encompassed within the Draft Order's "Remedies for Non-Compliance" section and the draconian, skewed outcomes that will result in the absence of substantial changes to it. The Associations continue to discuss potential solutions to these problems "that take into account the Commission's desire for program compliance and accountability but [will] still lead to a more rational result for end-of-term testing,"⁸ and intend to further supplement the record with one or more potential solution(s) imminently.

Please do not hesitate to contact any of the undersigned with any questions regarding this submission.

Respectfully submitted,

/s/

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⁷ Because the *Broadband Performance Measurements Order* specifically depicts as an example of how latency compliance will be measured statewide the scenario of a provider meeting the latency threshold in 90% of its testing hours measurements, the Draft Order could further illustrate that this would lead to a latency compliance percentage of 94.7% in that state. *See Broadband Performance Measurements Order*, 33 FCC Rcd at 6532, para. 61.

⁸ Association Letters at 3.